No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1967

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

PACIFIC MARITIME ASSOCIATION AND
MARINE TERMINALS CORPORATION, INTERVENORS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE FEDERAL MARITIME COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 371 F.2d 747. The opinion of the Federal Maritime Commission (R. 666a-728a)[1] is reported at 9 F.M.C. 77.

[1] "R" refers to the Joint Appendix printed for the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a) was entered on December 22, 1966. The petition for writ of certiorari was filed on March 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a rational basis for the Federal Maritime Commission's ruling that an agreement among ocean common carriers and marine terminal operators to allocate among themselves the industry labor cost of a collective bargaining agreement, standing by itself, (that is, without an additional agreement to pass on a part or all of these costs) is not an agreement of the type required to be filed for approval under Section 15 of the Shipping Act, 1916 (46 U.S.C. 814).

2. Whether there was a rational basis and substantial evidence in support of the Commission's judgment that the method of assessing automobiles which resulted from the agreement to allocate labor costs did not constitute unreasonable prejudice in violation of Section 16 of the Act and was not an unreasonable practice in violation of Section 17 of the Act.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act of 1916, 46 U.S.C. § 801, *et seq.*, are set out in the petition, pp. 3-4.

STATEMENT

Petitioner is a German corporation which manufactures Volkswagen automobiles and ships those automobiles to ports on the United States Pacific Coast by

means of common carrier and chartered (contract) vessels. Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles (MTC) were the respondents in the Commission complaint proceeding, were intervenors before the court below, and are intervenors here. MTC operates ocean terminals and performs stevedoring services at San Francisco and Long Beach, most of which is performed for common carriers. MTC belongs to carloaders associations whose agreements have been filed with and approved by the Federal Maritime Commission, pursuant to section 15 of the Act. Pacific Maritime Association (PMA), an intervenor in the Commission complaint proceeding, and also an intervenor in the court below and before this Court, is a nonprofit corporation organized in 1949 for the purpose of negotiating and administering labor contracts (R. 667a) with labor unions, on behalf of its membership. Common and contract carriers, marine terminal operators, and stevedore contractors are eligible for membership in PMA, although shippers *per se* are not eligible for such membership. Collective bargaining between PMA, on the one hand, and the unions, on the other hand, is confined to longshore functions, i.e. the work of longshoremen and marine clerks. Insofar as this case is concerned, only the longshore functions are relevant (R. 616a).

The membership of PMA is made up of approximately 150 companies (R. 179a), and the organization itself has some 150 employees.[2] In addition to a pres-

[2] PMA derives its funds for the carrying out of its operations through assessments and membership dues, which are determined by the Board of Directors (R. 616a-617a).

ident, there are three vice-presidents who are in charge of finance, labor relations, and administration, respectively. PMA also has a director of offshore labor relations, a manager of a contract data department, and a bureau concerned with accident prevention (R. 180a). PMA's staff is concerned with such tasks as unemployment insurance claims, operating a central pay office for stevedores and terminal operators in the major ports, and maintaining certain area offices (*Ibid.*). PMA is not a ratemaking conference, and it has no responsibility or connection with ratemaking (R. 179a).

PMA undertakes to bargain collectively on behalf of its members with the International Longshoremen's and Warehousemen's Union (ILWU). Until recently, the labor situation at West Coast ports had been a chaotic one for some years. General maritime strikes occurred in 1934 and in 1936 (R. 183a), and relations between the union and employer groups thereupon became extremely strained. These events were followed by a third general strike in 1948, which lasted over one hundred days (R. 184a). After that strike, employers attempted to improve employer-union relations, but such attempts were generally unsuccessful. The employers complained of declining productivity, a worsening of work practices, and work stoppages, all of which resulted in steamship lines going out of business (R. 185a). In 1957, therefore, the situation was so acute that PMA attempted to negotiate with the ILWU to obtain guarantees that the employers would be free from strikes and slowdowns and would be able to introduce work-saving devices (R. 618a). In return, the

ILWU wanted assurances that workers would share in the monetary benefits realized from such work-saving devices, that there would be no acceleration of productivity demanded from individual workers, and, finally, that there would be no unsafe conditions created as a result of the introduction of work-saving devices (R. 618a).

After preliminary negotiations, PMA agreed to accumulate a fund of approximately $1,500,000 for the benefit of its members' employees (*Ibid*). This fund was described by the president of PMA as "earnest money—to demonstrate to the union that we were not just talking but seriously intended to reach a conclusion with them . . . " (R. 194a). At the same time, the ILWU agreed to a further study of mechanization which would be completed not later than June of 1960 (R. 246a-247a).

On October 18, 1960, PMA and the ILWU signed a "Memorandum of Agreement on Mechanization and Modernization." This agreement set up a "Mechanization and Modernization Fund" of $29,000,000, which sum was to be raised by PMA over a period of time to extend to July 1, 1966, on which date the agreement would expire (R. 274a). The fund was to be used to protect longshoremen and marine clerks from the consequences of reduced employment opportunities resulting from the modernization of longshore operations (Pet. App. 3a). As PMA's membership was responsible for the accumulation of the fund, the ILWU agreed to allow PMA solely to determine how the fund would be accumulated. During the negotiations leading up to the agreement on the fund, both PMA and

the ILWU had established a position with regard to the method of collection of the fund, but PMA eventually obtained the ILWU's agreement to allow PMA to determine the method, "inasmuch as the employer members of the bargaining unit had committed themselves specifically to the payment of the sum . . ." (R. 207a).

In order to raise the money required by the mechanization agreement, PMA appointed a Work Improvement Fund Committee to recommend how PMA members should be assessed. It is the method of raising the money from the members which gave rise to this litigation.

The Committee considered various methods of allocating this new labor cost: (1) contributions based on man-hours of each employer; (2) contributions based on cargo tonnage; (3) a combination of these; (4) a charge on cargo tonnage moving in containers; and (5) a system based on measurement of improvements in longshore productivity (R. 466a-467a; 92a-93a). A majority of the Committee recommended that the members be assessed on the basis of tonnage carried or handled. The considerations which led to this recommendation were summarized by the court below as follows (Pet. App. 21a):

> The Committee recommended a formula based on cargo tonnage as a "rough-and-ready" way to divide the cost, admittedly lacking the refinement of the productivity measurement method but also lacking its infeasibility and avoiding the inequity of the man-hour method whereby contributions are in *inverse* proportion to benefits received. It con-

> sidered that cargo volume though not necessarily proportional was some indicator of stevedoring activities and that administrative simplicity was a cardinal consideration.
>
> The Committee recognized further that there were also objectionable features of the tonnage formula but considered these to be less weighty than the objections inhering in the other formulae. It recommended that the formula be reviewed to prevent the continuation of any hardship or inequity that might develop. [Emphasis in original.]

In recommending the tonnage formula, the Committee noted that it would be the same as the formula which had been used for the computation of a portion of PMA dues (R. 470a). Tonnage dues, based on revenue tons of cargo, had been used for many years by PMA. It had also been the practice of PMA to use tonnage for the purpose of allocating other labor costs, the maintenance of dispatch halls along the coast, the cost of paying arbitrators' salaries, etc. (Pet. App. 21a-22a; R. 217a).[3]

The formula recommended by a majority of the Committee was adopted by PMA. Under the formula, each member would remit to PMA as trustee of the fund an amount equal to 27½¢ per ton of general cargo

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[3] In fact, the ILWU had proposed the tonnage formula, and requested that the formula be incorporated in the collective bargaining agreement, but PMA did not wish to limit its discretion in choosing the most reasonable formula it could devise (R. 201a). PMA told the ILWU it wanted flexibility to allocate the labor cost. PMA also feared that if a tonnage formula were included in the collective bargaining agreement, it would have a tendency to persist into the next contract (R. 210a; Pet. App. 21a).

carried or handled, and 5½¢ per ton of bulk cargo, a ton constituting for the purposes of the assessment 2000 pounds weight, or 40 cubic feet measurement. The assessment was to be based on the cargo as manifested for loading or discharging and so the amount of the assessment for a particular commodity would be related to whether the commodity was manifested by weight or measurement tons.

Unlike other cargo, however, which is usually manifested consistently either on a weight or measurement basis, automobiles are not uniformly manifested one way or another. PMA determined that for purposes of the mechanization fund automobiles should always be assessed on a measurement ton basis, however manifested (Pet. App. 4a). This method of assessing members on automobiles for the mechanization fund was the same as the method that had been used and was still being used in assessing members on automobiles for PMA dues (R. 524a).

A Volkswagen measures 8.7 tons on a measurement ton basis, whereas it measures only 0.9 tons on a weight ton basis. An assessment for the fund based on measurement tons at 27½¢ per ton equals $2.35 per vehicle; the same assessment on a weight ton basis equals $.25. Thus, the amount of the contribution to the fund on automobiles on a measurement ton basis was almost 10 times as great as on a weight ton basis (Pet. App. 4a-5a).

As a result of the contributions required by the formula adopted by PMA, the stevedore members of PMA increased their stevedore rates to the common carrier

members (R. 671a).[4] Respondent MTC, the PMA member which handles the unloading of petitioner's vehicles, increased its stevedore rates to petitioner, and this increase raised the cost of discharging petitioner's vehicles almost 25 percent. Petitioner refused to pay any increase resulting from an assessment based on measurement tons, even though MTC was willing to absorb a portion of the increase (*Ibid*).[5]

MTC could not itself absorb the entire assessment on automobile cargo. Therefore, when petitioner refused to pay the increased rate, MTC did not pay the assessment to PMA (R. 613a; Pet. App. 5a). PMA brought suit against MTC in the United States District Court, which then impleaded petitioner. Upon petitioner's request the district court stayed the court proceedings pending the submission to the Federal Maritime Commission of issues raised by petitioner concerning the legality of the assessments under the Shipping Act.

Petitioner thereupon filed a complaint with the Commission (R. 12a-17a). The complaint alleged that PMA, MTC and other members of PMA had entered into an agreement to impose upon petitioner an extra charge for terminal and stevedoring services in the form of an assessment and that since such agreement has not been filed with and approved by the Commission pursuant to section 15 of the Act, it is illegal and the assessment may not be imposed. The complaint

[4] Generally common carriers which pay for loading and unloading as part of the terms of carriage absorbed the increases resulting from the assessment (R. 632a-633a, 671a).

[5] Petitioner was the only shipper of automobiles who protested the assessments for the fund (R. 633a).

further alleged that the assessments adopted by PMA subjects petitioner and automobile cargo to undue prejudice, in violation of section 16 of the Act, and comprises an unreasonable practice in violation of section 17 (R. 14a).

After a full evidentiary hearing, the hearing examiner made extensive findings of fact and ruled that petitioner's allegations had not been sustained (R. 611a-656a). On exceptions to the examiner's decision, a majority of the Commission affirmed (R. 666a-678a). Proceeding on the assumption that both MTC and the other members of PMA were subject to the Act (R. 673a),[6] the Commission found that the agreement of the PMA members for allocating among themselves the industry labor cost incurred by virtue of the agreement with the union, was not, without more, within the scope of section 15 of the Act. Such an agreement, standing by itself, unlike an agreement among the members to pass on a part or all of the costs to shippers or carriers, has no impact on outsiders. On the other hand, had there been an additional agreement by the PMA membership to pass on the costs, it would have been subject to section 15 (R. 675a).

With respect to section 16, the Commission found that no violation had occurred because petitioner had failed to show that cargo competitive with its automo-

[6] MTC had argued that they were not "other persons" under section 1 of the Act, 46 U.S.C. 801 (R. 641a); PMA had argued that the method of raising the money to implement the agreement with the ILWU is part of a collective bargaining agreement and that the National Labor Relations Board had exclusive jurisdiction over it (R. 649a). The Commission did not resolve the jurisdictional issue but assumed for purposes of its decision that MTC and PMA were subject to the Act (R. 673a).

biles, namely, other automobiles, had been preferred and so its automobiles had not been subject to "prejudice or disadvantage".

The Commission further found no "unreasonable practice" in violation of section 17 (R. 677a), noting that "substantial benefits" had accrued from the mechanization agreement and that there is no statutory requirement that there be a precise equivalence between services and charges for all users of a facility. Contrary to petitioner's frequently recurring allegation, the Commission found that the method of allocating the costs was not adopted because of a design deliberately to burden automobile cargo more than other types of cargo, but was dictated by adequate business consideration and followed the precedent which had been used for collecting dues without protest (R. 677a).

In an exhaustive opinion (Pet. App. 1a-25a), which specifically took into account each of petitioner's points, the court of appeals—per Circuit Judges McGowan, Tamm and Leventhal—sustained the Commission in all respects. Giving due deference to the expertise of the Commission, the court upheld as tenable the position taken by the Commission that the agreement among PMA members for allocating the costs of the mechanization fund, standing alone (as distinguished from an additional agreement to pass on these costs), does not come within the provisions of section 15 (Pet. App. 15a-17a). The court likewise sustained the Commission's ruling of no unreasonable prejudice or practices under sections 16 and 17, respectively. The court agreed that a generally reasonable method for assessing benefits is permissible even though it produces some

instances of burdens disproportionate to the benefits. It noted that the method adopted by PMA was a rough and ready way to divide the cost of the mechanization agreement; that it was some indicator of stevedoring activities; that while it had objectionable features these were considered to be less weighty than other methods which had been examined; that it was simple to administer, a matter of considerable importance; and that the method continued in effect what had been an established industry practice for the purpose of assessing dues and allocating other labor costs (Pet. App. 20a-25a).

ARGUMENT

The petition presents no substantial question warranting further review by this Court. There is no conflict between circuits, and the decision below—which is based on an exhaustive and painstaking opinion—is correct.

I

The Commission's Finding That PMA's Agreement Is Not Subject to the Filing and Approval Requirements of Section 15 Is a Rational One, and No Further Review Is Warranted.

Section 15 of the Shipping Act requires common carriers by water and other persons subject to the Act to file with the Commission for approval every agreement falling into one of seven categories, including any agreement "fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing or destroying competition; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement." Upon approval, such an agreement is expressly exempt from the antitrust laws.

Carnation Co. v. *Pacific Westbound Conference,* 383 U.S. 213.

The Commission noted that the literal language of section 15 is broad enough to cover any "cooperative working arrangement" between persons subject to the Act (R. 673a-674a). Yet it would be neither good administration nor serve the statutory purpose of effective supervision of maritime trade practices to hold every cooperative arrangement within section 15. For such a holding would mean, the Commission pointed out, that agreements "to pool secretarial workers or share office space" for example, are subject to filing and approval (R. 674a). Such a holding may have a similar consequence for agreements which affect only labor-management relations. The Commission ruled, that unlike the situation which would have existed had the PMA members agreed to pass on a part or all of the increased labor costs to the public, the agreement among PMA members for allocating the costs among themselves, without more, has no direct impact upon outsiders and therefore does not fall within section 15 (R. 675a). The increased costs may or may not be reflected in higher rates the members charge for their services. While certain of the PMA members did increase their rates as a result of the assessment, others did not. The common carriers absorbed the assessment and some terminal operators apparently did so (R. 671a). Had none of the PMA members passed on the assessment, the agreement would have had no impact on third persons, direct or indirect. The line drawn by the Commission, we submit, is as clear as circumstances permit and makes for a more manageable ad-

ministration of the Act than would be a construction which includes all agreements, however indirect their impact and regardless of whether they pertain to ocean transportation.

Deferring to the Commission's expertise, "especially in view of the technical and specialized nature of the subject area over which it has jurisdiction," the court of appeals upheld the Commission's ruling as "a tenable one and not arbitrary or capricious . . . ." (Pet. App. 15a-16a). The decision below accords with this Court's teaching that "[w]here the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation," the court will give "great weight" to the agency's conclusion and the court's function is limited to determining whether the agency's decision "has warrant in the record and a reasonable basis in law." *Atlantic Rfg. Co.* v. *Federal Trade Commission,* 381 U.S. 357, 367-368; *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385; *Labor Board* v. *Hearst Publications, Inc.,* 322 U.S. 111, 130-131. This principle has also been applied in a variety of contexts under the Shipping Act. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303-307; *Persian Gulf Outward Frt. Conf.* v. *Federal Maritime Commission,* F. 2d C.A.D.C., No. 20,350, decided February 28, 1967; *Stockton Port District* v. *Federal Maritime Commission,* 369 F. 2d 380, 381 (C.A. 9), *cert. denied,* May 8, 1967, No. 1064, this Term; *Alcoa S.S. Co.* v. *Federal Maritime Commission,* 321 F. 2d 756, 759 (C.A.D.C.); *Trans-Pacific Freight Conf.* v. *Federal Maritime Commission,* 314 F. 2d 928,

935 (C.A. 9); *Swift & Co.* v. *Federal Maritime Commission,* 306 F. 2d 277, 281 (C.A.D.C.).

Contrary to the suggestion implicit in petitioner's position, there is nothing in the legislative history to suggest that all agreements by persons subject to the Act, whatever the impact and whether or not they pertain to transportation, are within the scope of section 15 and may therefore be immunized from the antitrust laws. See, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade* (the *Alexander Report*), H. Doc. 805, 63rd Cong., 2d Sess. 415. The Commission has disclaimed any authority under the Act to grant shipping lines an antitrust exemption with respect to all agreements, including even some which may be trade-restraining. *Hearings Before House Judiciary Antitrust Subcommittee on Monopoly Problems in Regulated Industries,* 86 Cong., 1st Sess., pp. 17-18, 45. Thus, agreements between carriers "that they will buy bunkers from one oil company, or agreeing that they will not buy from a given company" are agreements "that would not be covered by Section 15" and would not be "in the area carved out from the antitrust laws" (*Id.*, at 45).[7]

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[7] Petitioner, in quoting a passage from the Commission's report to suggest that the Commission limited the scope of section 15 only to agreements between parties in direct competition with each other (Pet. 13), fails to point out, however, that the case cited by the Commission plainly indicates that the Commission intended no such restriction. For, *D. J. Roach, Inc.* v. *Albany Port District, et al.*, 5 F.M.B. 333, 335, the case cited (R. 674a), involved an agreement between persons subject to the Act who were not in direct competition—the Albany Port District, the lessor of a terminal, and a terminal operator, which leased the terminal.

Petitioner's recurring theme is that it is the victim of retaliatory action by a combination of common carriers dominating PMA because it ships its automobiles on privately chartered vessels (Pet. 8, 10, 15, 16, 20, 23). The Commission, however, indicated that it had not been shown on the record before it that the method of assessing automobile cargo resulted from a "design deliberately to burden" automobile cargo more than other cargo (R. 677a). In any event, as the court of appeals pointed out, if petitioner is the target of an agreement by the shipping lines in restraint of trade, such an agreement, without the Commission's approval, would not be protected from attack under the antitrust laws (Pet. App. 25a, n. 13).

II

The Commission Correctly Found That the Method of Assessing Automobiles Did Not Violate Either Sections 16 or 17 of the Act.

Whether a discrimination is undue or a practice is unreasonable is, of course, a question committed to the expert judgment of the Commission, based upon an appreciation of all the facts and circumstances affecting the traffic. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303-304. The Commission showed a full appreciation of all the facts and circumstances, expressly noting, *inter alia,* that the measurement basis for assessing automobiles resulted in an assessment almost ten times greater than did a weight basis ($2.35 per vehicle as against $.25); that although other cargo was assessed as manifested, vehicles were always assessed on a meas-

urement basis;[8] that while automobile cargo will probably receive only general benefits from the fund plan (such as freedom from strikes and slow downs), such cargo, unlike some other cargo, is unlikely to benefit from technological improvements in loading and unloading (R. 677a). The Commission nevertheless held that the difference in treatment could not be deemed unreasonable because while automobile cargo may not have benefited as much as other cargo, it did receive substantial benefits from the mechanization agreement and there is no statutory requirement of precise equivalence between service and benefits. Furthermore, the assessment reflected a reasonable business judgment resulting from a careful consideration of alternative methods of assessment and was patterned after the method of assessing dues for years (R. 668a-669a, 677a).

The court of appeals gave careful consideration to each of petitioner's charges of discrimination (Pet. App. 18a-25a) and concluded that they do not require reversal of the Commission's order. For, as the court pointed out in summary, "a generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disproportionate to benefits." (Pet. App. 24a-25a). The affirmance of the Commission's order followed the settled principle that Congress has entrusted the Commission with broad discretion in dealing with problems under the Shipping Act and that there being a rational basis

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[8] Unlike other cargo, which was usually manifested consistently either on a weight or measurement basis, however, automobiles were not uniformly manifested one way or another (Pet. 4a).

for the Commission's resolution of the problem, the court could not substitute its judgment for that of the Commission, *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485; *Swayne & Hoyt Ltd.* v. *United States*, 300 U.S. 297, 304; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-621.[9]

Petitioner contends that the court of appeals sustained the Commission's determination of no unreasonable practices on grounds not considered by the agency (Pet. 24-27). A comparison of the Commission's report (R. 668a-678a) with the court's opinion (Pet. App. 19a-25a) shows that petitioner is mistaken. Petitioner's complaint may result from the fact that the court of appeals painstakingly scrutinized the record in order to resolve each of the many points raised by petitioner. Its conclusions and grounds, however, do not depart from those of the Commission's.

Petitioner can scarcely be heard to complain of the court of appeals' disposition of the section 16 issue. Before the Commission, petitioner had conceded that (1) a showing that competitive cargo (i.e., other automobile cargo) has been preferred was required to sustain a section 16 violation; and (2) such a showing could not be made. On that basis, the examiner and the Commission found no violation of section 16. In the court below, petitioner argued that no such showing

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[9] Petitioner is mistaken in suggesting that the Commission ruled that *only* maliciously motivated practices will bring section 17 into play (Pet. 23). The Commission's reference to a "design deliberately to burden" one form of cargo—obviously a response to petitioner's repeated charge that it was the target of retaliatory action by common carrier members of PMA—was to suggest that practices which are otherwise proper may violate the Act if done maliciously.

was necessary, citing *New York Foreign Freight Forwarders* v. *Federal Maritime Commission*, 337 F. 2d 289 (C.A. 2), *cert. denied*, 380 U.S. 910. The court below, upon upholding the Commission's ruling that the difference in treatment between automobile and other cargo was not unjustified and therefore not unreasonable within section 17, ruled that there was therefore no significant basis for the claim that petitioner is the victim of discrimination that is unreasonable under section 16. Accordingly, it found it unnecessary to consider petitioner's arguments based on the *New York Freight Forwarders* case. In any event, *New York Freight Forwarders* is not at all relevant. That case merely involved the power of the Commission to issue a "prophylactic disclosure" rule (337 F. 2d at 300), one which required freight forwarders to state separately their charges in billing customers so that "an informed shipping public will upon learning the factual details eliminate the discriminatory and unfair practices resulting from hidden charges for accessorial services" (*Ibid.*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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